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In the Supreme Court of the United States

OCTOBER TERM, 1970

C. H. GUENTHER & SON, INC., d/b/a
PIONEER FLOUR MILLS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 662

C. H. GUENTHER & SON, INC., d/b/a
PIONEER FLOUR MILLS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-8), is not yet officially reported. The decision and order of the National Labor Relations Board are reported at 174 NLRB No. 174.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1970. (Pet. App. 9). The petition for a

writ of certiorari was filed on September 8, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly concluded that employees who engaged in an economic strike are entitled to reinstatement upon the departure of their permanent replacements, where the strikers have made an unconditional offer to return to work and indicated their continued availability for such work.

2. Whether the Board properly concluded that strikers so entitled to reinstatement should be counted as part of the bargaining unit for purposes of determining whether the employer had a good faith basis for believing that the union had lost its majority status and thus was permitted to withdraw recognition.

3. Whether the Board acted reasonably in applying the foregoing principles in this case.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 10-11).

STATEMENT

A. The Board's Findings of Fact

Brewery Workers Local Union No. 110 has represented the Company's employees since 1951. In September 1966, about a month before the scheduled

termination of the then current collective bargaining agreement, the Union and the Company commenced negotiations on its renewal. The negotiations continued until January 19, 1967, but no new agreement was reached. Meanwhile, on October 3, the Union called a strike. (A. 99-100, 152; 179-180, 195-198).[1] Of the 96 employees in the bargaining unit, 79 joined the strike, 16 continued to work, and 1 died (A. 99-100, 152; 77-82, 242-243, 273).

The strike continued for four months, during which time the Company hired 46 replacements (A. 100, 153; 217). At the conclusion of the strike, on February 6, 1967, the Union made an unconditional request for reinstatement on behalf of all of the strikers. In addition, most of the strikers made individual written offers to return (A. 100, 152; 203, 61). Company attorney Wheatley informed Union Business Agent Eichler that strikers would be recalled within a few weeks—as the Company ceased subcontracting its work—and that the recall provisions of the old collective bargaining agreement would be followed (A. 100, 152; 205, 211). When Eichler asked about negotiating a new contract, however, Wheatley retorted, "[T]here is nothing to negotiate" (A. 101; 206). Eichler responded that the Union was still the employees' bargaining agent and would like to work out some agreement with the Company. Wheatley replied that he would let Eichler know (*ibid.*).

Between February 6 and February 18, 1967, the Company, without notifying the Union, recalled 21

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[1] "A." references are to the Appendix filed in the court below.

strikers. It then determined that, because of the institution of various labor saving devices and the dismantlement of one of its mills, no additional employees were needed (A. 155; 49). Thereafter, between February 14 and August 4, 3 temporary and 11 permanent replacements who had been hired during the strike left the Company's employ (A. 119-120, 157-159; 83-84, 125-126, 277-278, 297). However, the Company did not so notify the Union, which during that period had written six letters requesting information about the Company's operations and pointing out that a number of strikers had not been recalled (A. 63-76). Nor did the Company recall any additional strikers to fill the resulting vacancies, but instead hired new employees (A. 157, 325).[2]

B. The Decisions Below

The Board, following its decision in *Laidlaw Corp.*, 171 NLRB No. 175, enforced, 414 F. 2d 99 (C.A. 7), certiorari denied, 397 U.S. 920, held that the Company violated Section 8(a)(3) and (1) of the Act by refusing to recall 11 strikers upon the departure of their permanent replacements. The Board reasoned that the Company had discriminated against the strikers by hiring new employees rather than recalling the strikers who had indicated their willingness to return to work as vacancies arose, that it had no

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[2] The Company did recall strikers Simon Robles and Faustino Villarreal upon the departure of their replacements in June. But shortly after their return to work it informed them that they would be treated as new employees, and would not be allowed to retain their seniority and accrued vacation time (A. 126-127; 335, 344, 346, 350-351, 359-360).

substantial business justification for this, and that its action was therefore unlawful under the principles enunciated in *National Labor Relations Board* v. *Fleetwood Trailer Co.*, 389 U.S. 375. (A. 157-159, 160-161.) The Board also held that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily failing to recall strikers Henry Wilburn, Frank Samudio, and Casper Woytasczyk,[3] by failing to recall 3 strikers upon the departure of their temporary replacements, and by discriminatorily reducing the seniority and fringe benefits of strikers Simon Robles and Faustino Villarreal after their recall (A. 138-139, 160-161).[4]

In addition the Board found that the Company's refusal to bargain with the Union at the conclusion of the strike, and its rejection of the Union's request for information relevant to the conduct of the collective bargaining negotiations violated Section 8(a)(5) and (1). In the Board's view the considerations that led Congress to enact Section 9(c)(3) of the Act,

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[3] Henry Wilburn and Frank Samudio were both eligible for recall under the collective bargaining agreement, which the Company had stated it would follow in recalling strikers to work (A. 111-113, 116). Casper Woytasczyk had been replaced during the strike by an employee from the Company's Corpus Christi plant, who returned to Corpus Christi approximately a month after the strike terminated, and whom the Board accordingly found to be a temporary, rather than a permanent, replacement (A. 115). All three employees had been active union members during their employment, had served as officers of the Union, and had been members of the 1966-1967 negotiating committee (A. 113-116). Under these circumstances, the Board found that the Company's failure to recall the three employees was discriminatorily motivated.

[4] See note 2 *supra*.

which permits economic strikers to vote in a Board election even though they have been replaced (see n. 6, *infra*), also dictate that such strikers should be considered as part of the unit for purposes of determining whether a union continues to enjoy majority status when no election has been requested. Accordingly, since the bargaining unit consisted of the 16 employees who had not joined the strike, the 46 replacements, and the 79 strikers, the Company had no valid basis for doubting that the Union continued to represent a majority and therefore acted unlawfully in refusing to bargain with it upon termination of the strike. (A. 150-156.)

The Board ordered the Company to cease and desist from the unfair labor practices found, and from in any manner interfering with, restraining or coercing its employees in the exercise of their Section 7 rights. The Board also ordered the Company to (1) bargain with the Union and furnish it with any information relevant to such bargaining; (2) offer to Henry Wilburn, Frank Samudio and Casper Woytasczyk positions substantially equivalent to those they would have held absent the discrimination against them, and make them whole for any loss suffered as a result of that discrimination; (3) restore to Simon Robles and Faustino Villarreal their seniority and other benefits; (4) reinstate the 14 strikers who should have been recalled under the terms of the parties' 1964-1966 collective bargaining agreement, with backpay; and (5) post appropriate notices. (A. 139-143, 161-164.)

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 2-8).

ARGUMENT

1. Petitioner contends the Board misapplied the principles of *National Labor Relations Board* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375, by concluding that economic strikers who have manifested a willingness to return to work are entitled to reinstatement upon the departure of their permanent replacements. But unless an "employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice," 389 U.S. at 378, because Section 2(3) of the Act (Pet. App. 10) provides that "an individual whose work has ceased as a consequence of a labor dispute continues to be an employee if he has not obtained regular and substantially equivalent employment." Although the Company had a "substantial and legitimate business justification" for failing to reinstate immediately those strikers whose jobs were filled by permanent replacements, compare *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-456, it had no such justification for failing to reinstate the strikers as their replacements left. In view of the requests for reinstatement by the strikers and the Union, and the Union's continuous correspondence with the Company throughout the post-strike period, the Company "could not possibly have entertained any reasonable doubt that the strikers wanted their jobs

back," *Laidlaw Corp.* v. *National Labor Relations Board*, *supra*, 414 F. 2d at 106, and could have located them with ease. The decision of the court below that, in these circumstances, the refusal to reinstate the strikers violated Section 8(a)(3) and (1) follows from this Court's decision in *Fleetwood* and accords with the Seventh Circuit's decision in *Laidlaw Corp.*, *supra*, the only other circuit that has had occasion to consider the issue.

2. The court below adequately answered petitioner's contention that the Board erred in counting the strikers as part of the bargaining unit for purposes of determining whether the Union continued to have majority status at the time of the Company's refusal to bargain (Pet. App. 7):[5]

> Section 9(c)(3) of the Act demonstrates a congressional desire that economic strikers not entitled to reinstatement be permitted to vote in an election * * *. [L]ogic requires that such employees also be included in the unit when determining whether the Union continues to enjoy majority status. In both cases, the question is which employees are properly part of the bargaining unit.[6]

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[5] An employer violates Section 8(a)(5) of the Act by refusing to bargain with a previously recognized union absent a showing of objective considerations sufficient to warrant a "good-faith" doubt that the union's majority status has continued. See *Convair Division of General Dynamics Corp.*, 169 NLRB No. 26.

[6] Prior to 1959, Section 9(c)(3) of the Act provided that strikers not entitled to reinstatement as of the date of the

As the court further noted (*ibid.*), under *Fleetwood* and *Laidlaw* economic strikers maintain a continuing interest in and expectation of future employment with their employer until they obtain other "regular and substantially equivalent employment" or the employer has a legitimate and substantial business justification for failing to reinstate them. Since the 79 strikers constituted a clear majority of the Company's post-strike work force of 141 employees, the Board properly determined that the Company had no valid basis for refusing to bargain with the Union upon termination of the strike.[7]

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election could not vote. In 1959, Congress amended the section to provide:

> Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike * * *.

The legislative history of this amendment reveals Congress' determination that the earlier provision had placed an unfair burden upon economic strikers by permitting them to strike only at the risk of loss of membership in the bargaining unit, and was "an unfair, 'union-busting' rule." I Legislative History of the Labor-Management Reporting & Disclosure Act of 1959, 428 (GPO, 1960); II Leg. Hist. 1064-1065, 1070, 1138.

[7] Contrary to petitioner, the Board's position that replaced strikers who have manifested a willingness to return to work should be treated as part of the bargaining unit for purposes of determining the union's continued majority status (which represents a reversal of an earlier view, *Stoner Rubber Co.*, 123 NLRB 1440, 1445-1446), does not mean that an employer may never obtain a Board election pursuant to Section 9(c)(1)(B) of the Act. The employer can obtain such an election

3. The court of appeals properly rejected petitioner's contention that it is inequitable to award backpay and order bargaining since the Board's decision rests on principles which were formulated after the Company's action was taken. As this Court has stated, the effect of "retroactivity must be balanced against the mischief of producing a result that is contrary to a statutory design [or] to legal and equitable principles." *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 203. Thus, "the importance of protecting the statutory rights of [the company's] employees outweighs the fact that the company may have relied on a prior Board rule or policy." *Laidlaw Corp.* v. *National Labor Relations Board, supra*, 414 F.2d at 107; cf. *National Labor Relations Board* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264-265. Moreover, as the court below pointed out (Pet. App. 7-8), "requiring the Company to bargain with the Union upon request for a reasonable period of time will not unduly burden the Company. At the same time, it is the only remedy which can restore the *status quo ante*, and dissipate the effects of the Company's un-

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if he can present "objective considerations demonstrating reasonable grounds for believing that the labor organization has lost its majority status". Section 101.17, NLRB Statements of Procedure, 29 C.F.R. 101.17. See *United States Gypsum Co.*, 157 NLRB 652, 655. Thus, the employer could show that a substantial number of strikers had obtained other regular and substantially equivalent employment, which would mean that they were no longer "employees," Section 2(3), or that a sufficient number of strikers had failed to file, or keep current, an application for their old jobs, or that they had defected from the union.

lawful withdrawal of recognition from the Union. Thus, whether or not the Company in good faith relied on earlier Board decisions, the Board drew the proper balance, and its bargaining order should be enforced."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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